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11

12 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION
13

14 MICHELLE SHULTZ,

Case No. 3:19-cv-1936
15 Plaintiff,

v.                                **COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**
16 LINKNOW MEDIA,

**CLASS ACTION**
17 Defendant.

**JURY TRIAL DEMAND**
18

19

20 **I.     NATURE OF THE ACTION**

21 1.     LinkNow Media called Plaintiff Michelle Shultz's cellular phone in an effort to

22 market LinkNow's website design services. LinkNow used an automatic telephone dialing

23 system ("ATDS") to make these calls.

24

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 1

2.      Plaintiff has not been a LinkNow customer at any time. Plaintiff never consented to receive this call from LinkNow.

3.      Plaintiff brings this class action for damages and other equitable and legal remedies resulting from LinkNow's violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA").

## II.      PARTIES

4.      Plaintiff Michelle Shultz resides in Alameda County, California.

5.      Defendant LinkNow Media is a Canadian corporation with its principal place of business at 4700 Rue de la Savane, Suite 210, Montreal Qc H4P 1T7. The allegations in this Complaint as to acts and omissions by LinkNow shall be construed as allegations against LinkNow, whether such conduct was committed by LinkNow directly, or through its agents.

## III.      JURISDICTION AND VENUE

6.      This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiff's claims present a federal question.

7.      This Court has personal jurisdiction over LinkNow because it directed the call that is the subject of this action to Plaintiff's cellular phone. Plaintiff's cellular phone uses a California area code. LinkNow continuously and systematically conducts business in California, within this District.

8.      Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to Plaintiff's claims occurred in this District.

9.      Assignment to this Division is proper pursuant to Civil L.R. 3-2(c) because a substantial part of the events or omissions that give rise to Plaintiff's claims—namely, receipt of the illegal telemarketing—occurred in Alameda County.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 2

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## IV.   BACKGROUND AND FACTS

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### A.   The TCPA was enacted to curb harassing robocalls.

3       10.   In 1991, Congress enacted the TCPA in response to a growing number of

4   consumer complaints regarding certain telemarketing practices.

5       11.   In enacting the TCPA, Congress found: "Evidence compiled by Congress

6   indicates that residential telephone subscribers consider automated or prerecorded telephone

7   calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of

8   privacy." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 §

9   2(10). Congress continued: "Banning such automated or prerecorded telephone calls to the home,

10   except when the receiving party consents to receiving the call or when such calls are necessary in

11   an emergency situation affecting the health and safety of the consumer, is the only effective

12   means of protecting telephone consumers from this nuisance and privacy invasion." *Id.* § 2(12).

13       12.   The TCPA's sponsor described unwanted robocalls as "the scourge of modern

14   civilization. They wake us up in the morning; they interrupt our dinner at night; they force the

15   sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall." 137

16   Cong. Rec. 30,821 (1991) (statement of Sen. Hollings).

17       13.   The TCPA makes it unlawful "to make any call (other than a call made for

18   emergency purposes or made with the prior express consent of the called party) using an

19   automatic telephone dialing system or an artificial or prerecorded voice … to any telephone

20   number assigned to a … cellular telephone service." 47 U.S.C. § 227(b)(1). The FCC refers to

21   calls made by an automated telephone dialing system ("ATDS") or with a prerecorded or

22   artificial voice as "robocalls."

23       14.   Prior express written consent is required before making telemarketing robocalls to

24   wireless numbers:

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 3

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> [A] consumer's written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received clear and conspicuous disclosure of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.

7   *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC

8   Rcd. 1830, 1844 ¶ 33 (2012) (footnotes omitted) (internal quotation marks omitted).

9        15.     The TCPA provides a private cause of action to persons who receive calls in

10  violation of 47 U.S.C. § 227(b)(1). 47 U.S.C. § 227(b)(3).

11  **B.     The number of robocalls continues to increase.**

12       16.     Industry data shows that the number of robocalls made each month increased

13  from 831 million in September 2015 to 4.7 billion in December 2018—a 466% increase in three

14  years.

15       17.     According to online robocall tracking service "YouMail," 5.2 billion robocalls

16  were placed in March 2019 at a rate of 168.8 million per day. www.robocallindex.com (last

17  visited April 9, 2019). YouMail estimates that 2019 robocall totals will exceed 60 billion. *See id.*

18       18.     The FCC also has received an increasing number of complaints about unwanted

19  calls, with 150,000 complaints in 2016, 185,000 complaints in 2017, and 232,000 complaints in

20  2018. FCC, Consumer Complaint Data Center, www.fcc.gov/consumer-help-center-data (last

21  visited April 9, 2019).

22  **C.     LinkNow placed an unsolicited, automated, telemarketing call to Plaintiff's cell phone.**

23
24       19.     LinkNow designs websites for small businesses.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 4

1    20.    LinkNow attempts to identify new customers through telemarketing.

2    21.    One of the ways that LinkNow identifies new customers involves an ATDS.

3    22.    Plaintiff's telephone number, 925-351-XXXX, is assigned to a cellular telephone

4    service.

5    23.    On February 1, 2019, Plaintiff received an automated call from a number with the

6    Caller ID (909) 343-5488.

7    24.    When Plaintiff answered the call, there was no one on the other line.

8    25.    Plaintiff said "hello" several times.

9    26.    Instead of a response, Plaintiff heard a loud click and then a pause.

10    27.    The loud click and the pause are indicative of a predictive dialer being used, as

11    the sound heard by the call recipient is the algorithm of the predictive dialer's computer

12    attempting to send the call to a telemarketing representative.

13    28.    A predictive dialer is an ATDS for purposes of the TCPA.

14    29.    When a live human finally came on the line, she identified herself as "Fallon" and

15    promoted LinkNow's services.

16    30.    Plaintiff, skeptical of the unsolicited cold call, requested a written contact so she

17    could investigate the call.

18    31.    Plaintiff then received an e-mail from "Fallon Champagne – LinkNow Media"

19    from the e-mail address "website-design@linknowmail.com".

20    **D.    LinkNow's TCPA violations injured Plaintiff.**

21    32.    During the relevant period, Plaintiff has carried her cellular phone with her at

22    most times so she can be available to family, friends, and associates.

23    33.    LinkNow's call invaded Plaintiff's privacy and intruded on her right to seclusion.

24    The call frustrated and upset Plaintiff by interrupting her daily life and wasting her time.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 5

1    34.    LinkNow's call intruded upon and occupied the capacity of Plaintiff's cell phone.

2  The call temporarily seized and trespassed upon Plaintiff's use of her cell phone and caused her

3  to divert attention away from other activities to address the call.

4    35.    Other people have complained about harassing calls from LinkNow.

5    36.    Plaintiff's experience with LinkNow is not unique. People recently have

6  complained on the website 800notes.com about harassing calls from that telephone number. For

7  example, on December 21, 2018, a person named Sasha complained, "Calls every day. Never

8  leaves a message." *See https://800notes.com/Phone.aspx/1-909-343-5488* (last visited April 9,

9  2019). And on February 27, 2019, a "shop owner" complained "TELEMARKETER CALLS

10  JUST ABOUT EVERY OTHER DAY." *Id.* Interspersed among the complaints was a banner

11  advertisement for LinkNowMedia. *Id.*

12    37.    Recent complaint activity on the website everycaller.com shows four callers

13  reported calls from that number as "spam." *See* https://www.everycaller.com/phone-number/1-

14  909-343-5488/ (last visited April 9, 2019).

15                **V.    CLASS ACTION ALLEGATIONS**

16    38.    Plaintiff brings this lawsuit under Federal Rules of Civil Procedure 23(a) and

17  (b)(3) as a representative of the following Class:

18         All persons within the United States to whom Defendant or a third
           party acting on its behalf, (a) made one or more non-emergency
19         telephone calls; (b) to their cellular telephone number; (c) using an
           automatic telephone dialing system or an artificial or prerecorded
20         voice; (d) at any time in the period that begins April 10, 2015 to
           trial.
21
    Plaintiff reserves the right to amend the Class definition following an appropriate period of
22
    discovery.
23

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COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 6

1    39.    Because auto-dialing equipment maintains records of each contact, members of

2    the Class can be identified through LinkNow's or its agents' or affiliates' records.

3    **A.    Numerosity.**

4    40.    At the time of filing, Plaintiff does not know the exact number of Class members.

5    But the potential Class members number at least in the thousands, since automated telemarketing

6    campaigns make calls to hundreds or thousands of individuals a day.

7    41.    The alleged size and geographic dispersal of the Class makes joinder of all Class

8    members impracticable.

9    **B.    Commonality and Predominance.**

10    42.    There are questions of law and fact common to Plaintiff and to the proposed class,

11    including but not limited to the following:

12    43.    Whether LinkNow's dialing system(s) constitute an ATDS under the TCPA;

13    44.    Whether LinkNow used an ATDS to place non-emergency calls to the cellular

14    telephones of Plaintiff and Class members without their prior express consent;

15    45.    Whether LinkNow's telephone calls were made knowingly or willfully; and

16    46.    Whether Plaintiff and Class members were injured by receiving such calls.

17    **C.    Typicality.**

18    47.    Plaintiff's claims are typical of the claims of the Class, in that Plaintiff, like all

19    Class members, has been injured by LinkNow's uniform misconduct—the placement of calls to

20    cellular telephones for non-emergency purposes without the prior written express consent of the

21    called parties.

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COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 7

1    **D.    Adequacy.**

2        48.    Plaintiff will fairly and adequately protect the interests of the Class and is

3    committed to the vigorous prosecution of this action. Plaintiff has retained counsel experienced

4    in class action litigation and matters involving TCPA violations.

5    **E.    Superiority.**

6        49.    A class action is superior to other available methods for the fair and efficient

7    adjudication of this controversy. Because the amount of each individual Class member's claim is

8    small relative to the complexity of the litigation, and because of LinkNow's financial resources,

9    Class members are unlikely to pursue legal redress individually for the violations detailed in this

10   complaint. Class-wide damages are essential to induce LinkNow to comply with federal law.

11   Individualized litigation would significantly increase the delay and expense to all parties and to

12   the Court and would create the potential for inconsistent and contradictory rulings. By contrast, a

13   class action presents fewer management difficulties, allows claims to be heard which would

14   otherwise go unheard because of the expense of bringing individual lawsuits, and provides the

15   benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

16                            **VI.    FIRST CLAIM FOR RELIEF**

17                    **(Violations of the TCPA, 47 U.S.C. § 227, *et seq.*)**

18        50.    Plaintiff incorporates the above allegations by reference.

19        51.    LinkNow or its agents used an automatic telephone-dialing system or an artificial

20   or prerecorded voice to make non-emergency calls to the cellular telephones of Plaintiff and

21   Class members, without their prior express written consent.

22        52.    The foregoing acts and omissions violate the TCPA, including, but not limited to,

23   47 U.S.C. § 227(b)(1)(A)(iii).

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COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 8

1    53.    Plaintiff and members of the Class are entitled to an award of $500 in damages

2  for each such violation. 47 U.S.C. § 227(b)(3)(B).

3    54.    Plaintiff and members of the Class are also entitled to an injunction prohibiting

4  LinkNow or its affiliates and agents from placing non-emergency calls to any cellular telephone

5  number using an ATDS and/or artificial or prerecorded voice.

6    55.    The foregoing acts and omissions constitute knowing and/or willful violations of

7  the TCPA, including, but not limited to, violations of 47 U.S.C. § 227(b)(1)(A)(iii) and 47 C.F.R.

8  §§ 64.1200(a)(1)(iii).

9    56.    Under 47 U.S.C. § 227(b)(3)(C), and as a result of the alleged knowing and/or

10  willful violations of the TCPA, Plaintiff and Class members are entitled to an award of $1,500.00

11  in statutory damages for every call placed in violation of the TCPA

12                      **VII.    PRAYER FOR RELIEF**

13    WHEREFORE, Plaintiff, on her own behalf and on behalf of all members of the Class,

14  pray for judgment against LinkNow as follows:

15    A.    Certification of the proposed Class;

16    B.    Appointment of Plaintiff as representative of the Class;

17    C.    Appointment of the undersigned counsel as counsel for the Class;

18    D.    A declaration that actions complained of herein violate the TCPA;

19    E.    An order enjoining LinkNow and its affiliates, agents and related entities from

20  making automated calls;

21    F.    An award to Plaintiff and the Class of damages, as allowed by law;

22    G.    An award to Plaintiff and the Class of costs and attorneys' fees, as allowed by

23  law, equity and/or California Code of Civil Procedure section 1021.5;

24    H.    Leave to amend this Complaint to conform to the evidence presented at trial; and

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 9

I.      Orders granting such other and further relief as the Court deems necessary, just, and proper.

## VIII.    DEMAND FOR JURY

Plaintiff demands a trial by jury for all issues so triable.

RESPECTFULLY SUBMITTED AND DATED this 10th day of April, 2019.


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